

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THOMAS P. DYE,

Petitioner,

v.

KEN CLARK, Warden,

Respondent.

Case No. 09cv2483-BLM

ORDER:

**(1) DENYING MOTION FOR
CERTIFICATE OF APPEALABILITY
[ECF No. 19]; AND**

**(2) GRANTING MOTION FOR
EXTENSION OF TIME TO FILE
NOTICE OF APPEAL [ECF No. 20]**

On June 29, 2010, this Court issued an Order¹ Denying Petitioner's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 and Motion for an Evidentiary Hearing. ECF No. 15. The Court entered judgment to that effect on June 30, 2010. ECF No. 16. On September 7, 2010, Petitioner filed a Notice of Appeal and a Declaration in Support of his Notice of Appeal (ECF No. 18), which the Court construed as a Motion/Request for a Certificate of Appealability (ECF No. 19) and a Motion/Request for an Extension of Time to File a Notice of Appeal (ECF No. 20). For the reasons set forth below, the Court **GRANTS** Petitioner's Motion to File a Notice of Appeal and **DENIES** Petitioner's Motion for Certificate of Appealability.

A. Notice of Appeal

An appeal from the denial of a habeas petition is considered a "civil" matter and thus

¹ In accordance with the provisions of 28 U.S.C. § 636(c) and FRCP 73, the parties in this case voluntarily consented to have United States Magistrate Judge Barbara L. Major adjudicate the entire case and order the entry of a final judgment. See ECF Nos. 5 & 8.

1 subject to the time limitations set forth in Rule 4 of the Federal Rules of Appellate Procedure and
2 a timely notice of appeal is mandatory and jurisdictional. Browder v. Dir. Dep't of Corr., 434 U.S.
3 257, 264 (1978); Malone v. Aventi, 850 F.2d 569, 571 (9th Cir. 1988). Rule 4(a)(1)(A) requires
4 that a notice of appeal be filed within 30 days after the district court enters judgment where, as
5 here, the United States is not a party. Fed. R. App. P. 4(a)(1)(A). The district court may extend
6 the period of time to file a notice of appeal if "a party so moves no later than 30 days after the
7 time prescribed by [] Rule 4(a) expires" and "that party shows excusable neglect or good cause."
8 Fed. R. App. P. 4(a)(5)(A)(i)-(ii). However, the district court also may "reopen the time to file
9 an appeal" if: (1) the moving party did not receive notice of the entry of the judgment within 21
10 days after entry; (2) the motion is filed within 180 days after the judgment is entered or within
11 14 days after the moving party receives notice of the entry, whichever is earlier; and (3) no party
12 would be prejudiced. Fed. R. App. P. 4(a)(6).

13 Here, Petitioner did not file his declaration and Notice of Appeal until September 7, 2010.
14 ECF No. 18-1 at 2; Fed. R. App. P. 4(c)(1) (timeliness of notice determined by date inmate
15 deposits it in institution's internal mail system). Petitioner's motion exceeds the time limits
16 imposed by Rule 4(a)(1) and Rule 4(a)(5), so the Court must evaluate it utilizing the
17 requirements set forth in Rule 4(a)(6). In his declaration, Petitioner avers that he did not receive
18 a copy of the decision or judgment issued by this Court and explains that he was moved from
19 one prison to another in July 2010. ECF No. 18-1. Based upon this declaration, the Court finds
20 that Petitioner did not receive notice of the entry of judgment within 21 days after entry.
21 Petitioner filed his motion on September 7, 2010, which is within 180 days after the entry of
22 judgment on June 30, 2010. ECF No. 16. His declaration also establishes that he filed the
23 motion within 14 days after receiving notice of the judgment. ECF No. 18-1 (received letter from
24 court containing docket entries on September 2, 2010 and filed motion on September 7, 2010).
25 Finally, the Court finds that neither party will be prejudiced by reopening the time to file a notice
26 of appeal. Accordingly, the Court grants Petitioner's request to reopen the time to file a notice
27 of appeal pursuant to Rule 4(a)(6) and accepts the filed Notice of Appeal as timely.

28 ///

1 **B. Certificate of Appealability**

2 Under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110
 3 Stat. 1214 (1996) ("AEDPA"), a state prisoner may not appeal the denial of a habeas petition
 4 unless he obtains a certificate of appealability (COA) from a circuit justice or judge.² See 28
 5 U.S.C. § 2253(c)(1)(A); see also United States v. Asrar, 116 F.3d 1268, 1269-70 (9th Cir. 1997)
 6 (holding that district courts retain authority to issue a COA under the AEDPA and stating that "[i]f
 7 no express request is made for a certificate of appealability, the notice of appeal shall be deemed
 8 to constitute a request for a certificate."). In deciding whether to grant a COA, a court must
 9 either indicate the specific issues supporting a certificate or state the reasons why a certificate
 10 is not warranted. See 28 U.S.C. § 2253(c)(3); Asrar, 116 F.3d at 1270.

11 A court may issue a COA only if the applicant has made a "substantial showing of the
 12 denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If a habeas petition has been denied
 13 on the merits, the Supreme Court has stated that "[t]he petitioner must demonstrate that
 14 reasonable jurists would find the district court's assessment of the constitutional claims debatable
 15 or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

16 This Court denied each of Petitioner's constitutional claims on the merits. See ECF No.
 17 15. Yet, in his Motion for a Certificate of Appealability, Petitioner simply requests that his "notice
 18 of appeal be honored, and that a certificate of appealability be granted as to each of the three
 19 issues raised in [his] habeas petition." ECF No. 18 at 1. As such, Petitioner has not made a
 20 "substantial showing of the denial of a constitutional right" (28 U.S.C. § 2253(c)(2)), nor has he
 21 demonstrated that "reasonable jurists would find the district court's assessment of the
 22 constitutional claims debatable or wrong" (Slack, 529 U.S. at 484). Moreover, the Court has
 23 independently reviewed its order and finds that reasonable jurists would not find the
 24

25 ²Although the phrase "circuit justice or judge" is ambiguous, it is well settled that the phrase includes district
 26 judges as well as circuit judges. See, e.g., Hanson v. Mahoney, 433 F.3d 1107, 1111 (9th Cir. 2006); United States
 27 v. Asrar, 116 F.3d 1268, 1269-70 (9th Cir. 1997). Similarly, "nothing in the phrase ['circuit justice or judge'] suggests
 28 that Congress intended the words 'circuit justice or judge' to exclude magistrate judges when they act in a capacity
 otherwise authorized by the Magistrates Act," and "[i]ssuing a COA is within the scope of the authority granted to
 magistrate judges under the Federal Magistrates Act." Hanson, 433 F.3d at 1111, 1112 ("Accordingly we hold that
 magistrate judges may issue COAs if they have been authorized by consent of the parties to adjudicate the entire case
 pursuant to 28 U.S.C. § 636(c)(1).").

1 constitutional determinations to be debatable or wrong. Rule 11(a), 28 U.S.C. foll. § 2254.
2 Accordingly, the Court declines to issue a certificate of appealability.

3 **CONCLUSION**

4 Petitioner did not file a timely notice of appeal. However, Petitioner satisfied the elements
5 of Rule 4(a)(6) of the Federal Rules of Appellate Procedure, and the Court therefore **GRANTS**
6 his motion for an extension of time to file his notice of appeal and orders that the notice be filed
7 and accepted as timely. However, Petitioner has not made a substantial showing of a
8 constitutional violation, nor has he demonstrated that this Court's constitutional determinations
9 were debatable or wrong. And, this Court's independent review of its constitutional
10 determinations confirms that reasonable jurists would not find them debatable. Accordingly, the
11 Court declines to issue a certificate of appealability and **DENIES** Petitioner's Motion for
12 Certificate of Appealability.

13 **IT IS SO ORDERED.**

14 DATED: September 28, 2010

15 

16 BARBARA L. MAJOR
17 United States Magistrate Judge
18
19
20
21
22
23
24
25
26
27
28